Tr. 03/17/98 at 131, 138. Prior to trial, Ms. Gutierrez and Mr. Konstanty, separately and without hesitation, selected the petitioner's photograph from a spread Detective Richard Cline showed them. Tr. 03/18/98 at 39, 41-42; Tr. 03/18/98 at 21-22, 28. Ms. Landaeta went to the same school as Mr. Bustillo, where she would see him every day because she shared a class with him. Tr. 03/18/98 at 20-21. She also knew that Mr. Bustillo lived approximately five minutes from the Popeye's restaurant, and she, Ms. Gutierrez, and another friend showed the police to his home. Tr. 03/18/98 at 22-23, 43, 67.

b. Mr. Bustillo's Defense

Mr. Bustillo claimed that a gang member nicknamed Sirena was responsible for the attack. Amilcar Amaya, who had been a member of Mr. Bustillo's gang, said he observed "Señor Julio," a/k/a Sirena, walk towards the area where Mr. Merry was standing. Tr. 03/18/98 at 90, 98-99. According to Mr. Amaya, when Sirena was close, he moved to the right, took out a bat, and hit Mr. Merry on the side of the head. Tr. 03/18/98 at 100, 110. Mr. Amaya testified that he did not see Mr. Bustillo there that evening at all, either inside or outside the restaurant, and stated that he was the one who shook hands with Mr. Merry inside the restaurant. Tr. 03/18/98 at 101.

At the time of trial, police did not know Sirena's identity. Tr. 03/18/98 at 70. He was referred to by one witness as having a first name "Julio." Police spoke with several individuals but no one could provide them with a

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263. He could no longer recall whether Mr. Bustillo had a bat. Tr. 03/17/98 at 264.

last name or any information about Sirena. Tr. 03/08/98 at 70.[5] Moreover, although several individuals had a clear view of the incident, not a *single* eyewitness told the police that Sirena was the one who struck the fatal blow. Tr. 03/18/98 at 53, 67-68, 69.

At the close of the case, the jury deliberated and found Mr. Bustillo guilty of the murder of Mr. Merry.

c. Post-Trial Motions

Mr. Bustillo, with a new retained attorney, filed a motion to set aside the jury's verdict. T.R. at 150-61. He supplemented this motion with an addendum. T.R. at 162-68. In that motion, he alleged: (1) insufficient evidence; (2) newly discovered evidence through "new" witnesses (Giovany Hernandez, Marvin Escobar and Jose Maldonado), and "false trial testimony" (Valeria Landaeta); (3) "illegally obtained evidence" in the form of alleged threats by Detective Cline to Nicholas Parada, and (4) a *Brady* violation, for the alleged nondisclosure of an allegedly exculpatory statement from Yahayra Quierolo.

The trial court held a hearing on the motion. Among other witnesses, Ms. Landaeta testified to the extensive pressure placed on her by a gang member to recant her testimony. Tr. 07/13/98 at 180-82, 211. The trial court denied the motion, finding that the allegations of police misconduct were not credible. Tr. 07/13/98 at 246-69. Mr. Bustillo then filed a renewed motion to set aside the

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[5] Sirena is referred to variously as Julio Sorto, Tr. 03/18/98 at 70; Ostorto, Julio, H.R. 402-03; Osorto, Julio C., H.R. 366-67; and Julio Cesar Osorto Herrera, T.R. 381, 390.

verdict, claiming still more newly discovered evidence and further allegations of police misconduct. T.R. 209-14. The trial court again denied the motion. T.R. 234-39.

3. The Appeals

Mr. Bustillo then appealed his conviction with the assistance of retained counsel. Virginia's intermediate appellate court, the Court of Appeals, affirmed. *See Bustillo v. Virginia*, 2000 WL 365930, April 11, 2000 (Va. App. 2000) (unpublished). The Supreme Court of Virginia affirmed the decision without comment. *See Bustillo v. Virginia*, No. 001110 (Va. 2000) (unpublished). This Court also declined to review the decision. *See Bustillo v. Virginia*, 532 U.S. 1072 (2001).

4. State Habeas Corpus Petition

Finally, Mr. Bustillo, again with the assistance of retained counsel, filed a petition for a writ of habeas corpus in the trial court.[6] He made two types of claims. First, he alleged his rights under the Vienna Convention on Consular Relations (Vienna Convention) were violated.

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[6] As an exhibit to his habeas corpus petition, Mr. Bustillo produced a videotape, obtained by Commerce Street Locos Gang member Reniery Alexis Espinoza Maradiaga, a/k/a Selwin Santa Maria. Mr. Maradiaga claims he surreptitiously videotaped "Sirena." Hab. Pet. Ex. 9; Hab. Pet. Ex. 4. This conversation took place in Honduras. Hab. Pet. Ex. 9B. In the videotape, Sirena says he was the one who struck the blow that killed James Merry. Hab. Pet. Ex. 9, p. 4. After some prodding, Sirena recalled that he was wearing a red sweater. Hab. Pet. Ex. 9, p. 3, 7. Mr. Maradiaga edited the tape so Sirena's location would not be determined. Hab. Pet. Ex. 9B. This "confession" was taped in late November of 1998, and affidavits to authenticate it were sworn in January of 1999. Hab. Pet. Ex. 9B.

He also alleged that his attorney was ineffective in a number of particulars and the prosecution and police had engaged in numerous acts of misconduct. H.R. at 1-63. In one of his claims of prosecutorial misconduct, Mr. Bustillo asserted that the prosecution possessed and withheld a photograph of "Sirena." H.R. at 39-40.

a. The Vienna Convention Claim

On May 3, 2002, Mr. Bustillo filed an "addendum" seeking to "augment" his habeas petition. He alleged that the Vienna Convention obligation was "absolute and non-delegable" but argued, in the alternative, that his retained counsel was ineffective for failing to advise Mr. Bustillo of his right to consult with the Honduran consulate. H.R. at 158. He later filed a motion for leave to amend his petition on this ground. H.R. at 254. The Director objected on the ground that this amendment did not "relate back" to the original claims and was barred by the statute of limitations. *Virginia Code* § 8.01-654(A)(2). H.R. at 272.

On August 8, 2002, the trial court dismissed the Vienna Convention claim based on *Slayton v. Parrigan*, 205 S.E.2d 680, 682 (Va. 1974), holding that the "[p]etitioner had ample time to raise the issue at trial or on appeal." *Pet. App.* at 47. The order did not address the "addendum" or requested amendment seeking to raise a claim of ineffective assistance of counsel for failing to inform Mr. Bustillo of his Vienna Convention rights. The Director filed a motion for clarification, with an affidavit from trial counsel, asking the court to rule on this claim. (H.R. 310). Mr. Bustillo's trial counsel explained in his affidavit that he was the son of a diplomat and was aware of the Vienna Convention. He deliberately did not advise his client of the Vienna Convention because he did not

want his client to speak to anyone for fear that these conversations might then be used against him at trial. H.R. at 318-19. The trial court entered an order amending the memorandum opinion on October 11, 2002, holding that the requested amendment was barred by the statute of limitations and, furthermore, had no merit under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). H.R. at 351.

b. The *Brady* Claims

In its August 18, 2002 order, the trial court also dismissed most of the habeas claims related to the alleged misconduct. *Pet. App.* at 38-48. However, the trial court also ordered an evidentiary hearing limited to the issue of when the prosecutor came into possession of a photograph and a videotape of Sirena. *Pet. App.* at 48-49. The trial court later entered a discovery order requiring the respondent to produce "the photograph of 'Sirena' a/k/a Julio Cesar Osorto Herrera . . . and any information possessed by the Fairfax Police Department pertaining to Sirena, a/k/a Julio Cesar Osorto Herrera." H.R. at 348.

In response, the Director produced several letters and exhibits including (1) a police report from Officer Mahoney and (2) notes from the lead detective of an interview with one of the members of Mr. Bustillo's gang, Amaya Canas. H.R. 365.[7]

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[7] Two documents disclosed to the petitioner in discovery are at issue. The first is a police report from Officer Mahoney dated December 10, 1997. The Mahoney report notes that "Osorto, Julio C." was stopped during a canvass of the area following the attack. The report notes that "Mr. Osorto has what appeared to be ketchup on his pant legs and a little on his shirt. He claimed he had come from McDonald's where he had eaten a cheeseburger. . . . He stated he lived at Chelsey Square

(Continued on following page)

Following the evidentiary hearing on December 5, 2002, the trial court denied habeas relief, holding that the undisclosed documents were not material. H.R. 454-58. On February 21, 2003, the trial court entered a final order to that effect. H.R. 468-69.

Mr. Bustillo next filed a motion to reconsider and a motion for another evidentiary hearing based on the police documents disclosed in habeas discovery. H.R. 481. The trial court overruled the Director's objections and stayed its final order. H.R. 471, 472-74. Mr. Bustillo subsequently filed motions to amend his petition to include a new *Brady* claim for failure to disclose these documents.

By letter opinion dated September 16, 2003, the trial court concluded that the information contained in the Mahoney report and the interview of Amaya Canas were exculpatory and should have been disclosed. Concerning Officer Mahoney's report, the trial court noted, in hind-sight, that the officers "*should have known*, given the contents of the investigative notes and the police report,

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Apartments, but was confused on the address." He denied being present at the Popeye's. Osorto was described as wearing a "Blk leather Jacket, Blue Jeans." H.R. 366-67.

The Director also disclosed police notes of an interview with a gang member, Jose Armando Amaya (Canas). Although these notes are described in part in the memorandum opinion of the court, the actual notes are not a part of the habeas record as Mr. Bustillo never moved for their admission. *Pet. App.* at 5 n.6. In the notes, Mr. Canas states that he observed Sirena running with a "cocked" bat towards Mr. Merry but that he could not see who struck Mr. Merry. At trial, the prosecution had disclosed in a discovery response that this witness told law enforcement that he saw the defendant and Sirena at the scene and both had bats. Both Mr. Bustillo and Sirena approached the victim with Sirena following Mr. Bustillo. Mr. Canas' view was obstructed by a brick pillar and he couldn't tell which one struck the victim. T.R. at 17.

that 'Sirena-Julio' and Julio Osorto *might be* one and the same person." H.R. 486 (emphasis added). The court granted the motion for reconsideration and ordered a hearing to determine whether a reasonable probability existed that "had the evidence been disclosed to the defense, the result of the criminal trial might have been different." H.R. at 491.

Following an evidentiary hearing on April 7, 2004, the court issued a detailed memorandum opinion concluding that even if the evidence had been disclosed to Mr. Bustillo, there was no reasonable likelihood of a different outcome. *Pet. App.* at 3-16.

5. Appeal of the Denial of the State Habeas Petition

Mr. Bustillo petitioned the Supreme Court of Virginia to hear his appeal of the denial of the habeas petition. With respect to the Vienna Convention claim, the Supreme Court of Virginia held that "there is no reversible error in the judgment complained of. . . . " *Pet. App.* at 1. As to the *Brady* claims, the court dismissed "the petition for appeal as to those assignments of error" because Mr. Bustillo "failed to file the habeas proceeding transcript(s)." *Pet. App.* at 1. This Petition followed.

REASONS FOR DENYING THE WRIT

Certiorari should be denied for two reasons. First, this Court should decline to review the Vienna Convention issue because this is an inappropriate vehicle to resolve the questions. Mr. Bustillo's claim is barred by the *Teague* rule. Moreover, in deciding the Vienna Convention issue, the lower court did not address a federal question, but

relied exclusively on state law. Furthermore, because there was no prejudice to Mr. Bustillo, the failure to follow the Vienna Convention was harmless error.

Second, this Court should decline to review the *Brady* claims. Initially, the claims are barred by an adequate and independent state ground. Moreover, the claims present nothing more than a routine *Brady* dispute.

I. THIS COURT SHOULD DECLINE TO REVIEW THE VIENNA CONVENTION ISSUE.

As the grant of certiorari in *Medellin* demonstrates, the Vienna Convention issue is important. However, this Petition provides a poor vehicle for resolving the issue. This is so for three reasons. First, the *Teague* rule bars Mr. Bustillo's claim. Second, the lower court's resolution of the Vienna Convention issue was based on state law and did not involve a federal question. Third, Mr. Bustillo was not prejudiced by the failure to follow the Vienna Convention.

A. Because His Conviction Became Final Before the Announcement of a "New" Rule, the *Teague* Rule Bars Mr. Bustillo's Vienna Convention Claim.

Regardless of whether the Vienna Convention creates judicially enforceable individual rights and whether the Vienna Convention requires state courts to ignore their procedural rules, Mr. Bustillo's claim is barred by the *Teague* rule.

Under this Court's precedents, a state conviction cannot be disturbed on federal collateral review based on a

"new rule" of federal law – a rule which was announced after a conviction became final.[8] *Teague*, 489 U.S. at 306-07. A conviction becomes final when the Court denies certiorari. *See O'Dell v. Netherland*, 521 U.S. 151, 157 (1997). Thus, Mr. Bustillo's conviction became final on June 4, 2001, when this Court denied certiorari. *See Bustillo*, 532 U.S. at 1072. Therefore, Mr. Bustillo can obtain habeas relief only if he can demonstrate that the rule he seeks to enforce – that the Vienna Convention creates judicially enforceable individual rights – existed prior to June 4, 2001.

Mr. Bustillo cannot meet this burden. First, this Court has never held that the Vienna Convention creates judicially enforceable individual rights. Indeed, Mr. Bustillo expressly urges this Court to overrule its decision in *Breard v. Greene*, 523 U.S. 371, 375 (1998) (*per curiam*), and adopt a new rule. Cert. Pet. at 19. Second, even if *Avena* and *LaGrand* are regarded as announcing a new rule binding on this Court and the lower courts, both of those decisions were rendered *after* Mr. Bustillo's conviction became final.[9] *Avena* was decided more than two years after Mr. Bustillo's conviction became final – and more than six years after his trial. *LaGrand* was decided on

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[8] Indeed, the *Teague* rule was one reason why this Court dismissed the Writ in *Medellin*. *See Medellin*, 125 S. Ct. at 2091.

[9] On March 7, 2005, President Bush, through his Secretary of State, notified the United Nations that the United States had formally withdrawn from the jurisdiction of the International Court of Justice (ICJ) in disputes over Vienna Convention claims. http://www.discourse.net/archives/2005/03/us_announces_withdrawal_from_consular_convention.html. Thus, whatever argument existed previously that the International Court of Justice's decisions were binding on United States courts is now largely academic.

June 27, 2001, just over three weeks after this Court denied certiorari. Thus, *Teague* precludes relief.[10]

If this Court is going to determine whether the Vienna Convention creates judicially enforceable individual rights, it should do so in a case where the conviction is not final. In other words, any new rule should come in a case on direct appeal, not a habeas corpus petition. Because Mr. Bustillo's conviction is final, his Petition should not be the mechanism for resolving the issue. Certiorari should be denied.

B. Because the State Court's Decision Regarding the Vienna Convention Issue Rested Exclusively on State Law, Certiorari Review Is Inappropriate.

Regardless of whether the Vienna Convention creates a judicially enforceable right or whether the *Teague* rule applies, the lower court's resolution of the Vienna Convention issue did not involve a federal question. To explain, it is essential that this Court understands the nature of the judgment below. Neither the trial court nor the Supreme Court of Virginia interpreted the Vienna Convention. Rather, both lower courts simply held that, as a matter of state law, the Vienna Convention claim was not cognizable in a Virginia habeas corpus proceeding. Because the decision regarding the Vienna Convention issue did not address a federal law question and relied exclusively on

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[10] Although most cases applying *Teague* have involved a federal habeas petition, nothing in the Court's reasoning limits the holding in *Teague* to that situation. The *Teague* Court plainly held that, subject to limited exceptions, new rules "will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 489 U.S. at 310.

state law, there is no basis for this Court to review the decision. *See Volt Info. Scis., Inc. v. Board of Tr. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989) ("this Court does not sit to review" questions of state law).

As with other extraordinary writs, Virginia law narrowly delineates the scope of the writ of *habeas corpus*. *See Virginia Code* §§ 8.01-635 through 668. Under long-standing Virginia law, "a claim that *could* have been raised at the criminal trial or on direct appeal is *not cognizable* in [state] habeas corpus [proceedings]. . . . " *Henry v. Warden*, 576 S.E.2d 495, 496 (Va. 2003) (emphasis in original and added, respectively). "Because allegations of trial court error are not cognizable by habeas corpus, habeas cannot be used as a substitute for an appeal." *Dodson v. Director*, 355 S.E.2d 573, 575 n.4 (Va. 1987) (internal citations omitted). Indeed, absent a showing of ineffective assistance of counsel, a Virginia trial court errs in even "permitting inquiry" on a question that could have been raised at trial and pursued on appeal. *Slayton*, 205 S.E.2d at 682. In other words, as a matter of state law, Virginia's state courts' authority to issue a writ of habeas corpus is limited to: (1) claims that could not have been raised at trial or on direct appeal, (2) lack of subject matter jurisdiction and (3) claims of ineffective assistance of counsel.

As a matter of *state law*, Mr. Bustillo utilized a proceeding that could not reach the Vienna Convention issue he raised.[11] In dismissing the Vienna Convention claim, the Virginia courts relied exclusively on state law. Virginia

[11] Mr. Bustillo was not without a remedy in state court. He could have pursued a claim that his attorney was ineffective for failing to raise the issue. However, he abandoned that claim in state court.

courts did not, and indeed could not, as a matter of state law reach the question Mr. Bustillo sought to raise.[11] Because the state court's judgment rested exclusively on state law regarding the scope of a state writ of habeas corpus, review on certiorari is inappropriate.[12]

Regardless of whether the Vienna Convention creates judicially enforceable individual rights, and whether Mr. Bustillo's claim is barred by the *Teague* rule, the Vienna Convention does not require Virginia courts to ignore Virginia law. Certiorari is barred by an adequate and independent state ground.

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[11] Furthermore, Mr. Bustillo asks the Court to require state courts to entertain Vienna Convention claims regardless of any state law impediments or the nature of the state proceeding below. To accomplish this end, this Court would have to dictate to state courts the scope they should attribute to a state law writ. This would constitute an unprecedented and, under the federalist structure of our government, an unconstitutional measure.

[12] Although review by certiorari is inappropriate, Mr. Bustillo could obtain review of his Vienna Convention claim by seeking an "original" writ of habeas corpus in this Court. *See* Sup. Ct. R. 20.4. While state or federal procedural rules may preclude certiorari review of habeas claims, they do not diminish this Court's ability to review such claims through an "original" writ of habeas corpus. *See Felker v. Turpin*, 518 U.S. 651, 661-62 (1996) ("The Act [*Antiterrorism and Effective Death Penalty Act of 1996*, Pub. L. 104-132, 110 Stat. 1217 (1996)] does remove our authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its 'gatekeeping' function over a second petition. But since it does not repeal our authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2."). *See also id.* at 666 (Stevens, J., joined by Souter & Breyer, J.J., concurring) ("As the Court correctly concludes, the Act does not divest this Court of jurisdiction to grant petitioner relief by issuing a writ of habeas corpus.").

C. Because Mr. Bustillo Was Not Prejudiced, the Failure to Follow the Vienna Convention Was Harmless Error.

Regardless of whether the Vienna Convention creates judicially enforceable individual rights, whether the *Teague* rule applies, or whether the Vienna Convention requires state courts to ignore their own procedural rules, the failure to follow the Vienna Convention was harmless error. Quite simply, Mr. Bustillo was not prejudiced by the arresting officers' failure to follow the Vienna Convention.[14]

To explain, Mr. Bustillo asserts that the failure to follow the Vienna Convention harmed him in three ways. First, he asserts that if the Honduran consular officials had been alerted, they could have obtained confirmation of the identity of Sirena and produced a photograph. Indeed, Mr. Bustillo claims that "when confronted with the photo of Sirena later provided by the Honduran government, several witnesses identified Sirena as the individual who struck [Mr.] Merry." *Pet.* at 24. Second, Mr. Bustillo asserts that the Honduran consulate would have provided confirmation that Sirena was on the flight to Honduras, in support of the trial testimony provided by Ulma Martinez. Tr. 03/18/98 at 167-68. Mr. Bustillo believes that Sirena's

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[14] Moreover, it is unclear that Mr. Bustillo would have availed himself of his Vienna Convention rights if he had been advised of those rights. Although Mr. Bustillo insists that the Director "has never disputed petitioner's sworn statement that . . . he would have requested to speak with consular officials," *Pet.* at 23 n.6, this is inaccurate. In the motion to dismiss, the Director denied each allegation not specifically admitted in the motion. Since the factual aspects of the Vienna Convention claim have not been developed, the veracity of Mr. Bustillo's assertion has never been tested.

travel to Honduras constitutes "powerful evidence" of Sirena's guilt, for "[t]he guilty 'flee when no man pursueth.'" *Pet.* at 22-23 (quoting Proverbs 28:1). Finally, Mr. Bustillo claims that, if the Honduran authorities had been involved, the videotaped "confession" of Sirena might have been obtained prior to trial and would have altered the outcome.[15] The Director disagrees with each of these assertions.

1. Obtaining the Photograph Before Trial Would Not Have Altered the Outcome.

Obtaining the photograph before trial would not have altered the outcome. The proffered testimony in the affidavits attached to the habeas petition is utterly unworthy of belief by any reasonable fact-finder. The witnesses Mr. Bustillo relies on consist chiefly of a parade of obviously biased gang members: Amilcar Amaya, Lisandro Parada, Marvin Escobar, and Godofredo Jimenez. T.R. at 465; Tr. 03/18/98 at 90-91; Tr. 07/13/98 at 39, 54. All of these "witnesses" have provided conflicting accounts and have shown what could charitably be described as a remarkable flexibility in their recollection. This flexibility would have been obvious to any fact-finder.

When interviewed by trial counsel, Mr. Escobar – who had known Sirena for three years and Mr. Bustillo for one

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[15] Mr. Bustillo also suggests that had he been informed of his Vienna Convention rights, the Honduran police might have obtained a surreptitiously videotaped confession from Sirena such as the one he proffered in the habeas corpus proceeding. However, Mr. Bustillo himself had to obtain this purported confession; nothing in the record suggests the police would have done so, or that it could have been done in time to assist him at his trial.

year – said he did not know who struck the blow. Tr. 07/13/98 at 94-95. By the time of the post-trial motion to reconsider, Mr. Escobar was sure it was Sirena. Tr. 07/13/98 at 43. Following the second habeas hearing, the trial court found Amilcar Amaya's testimony was not credible and specifically noted his inconsistencies. *Pet. App.* at 11. Mr. Jimenez, contrary to his more recent version, told the police that Mr. Bustillo was present – undermining Mr. Bustillo's alibi – and that he did not see who committed the assault. (Resp. Mot. to Dismiss Ex. 1, ¶ 2).

Claudia Tafur, Esmirna Christina Hondoy, and Yahayra Queirolo also provided affidavits in support of the habeas petition. Each also identified Sirena from the photograph as the assailant. T.R. at 285, 388, 392, 497. Although they are not gang members, their testimony is also vacillating and implausible. Ms. Tafur said on the evening of the attack, December 10, 1997, that Mr. Bustillo was the assailant. T.R. at 285. Ms. Tafur knew Sirena because she previously dated him and she went to school with Mr. Bustillo. T.R. at 388. A year and a half later, on June 16, 1999, she had come to understand that she "did not see enough of the assailant's face to be able to accurately concluse [sic] who it was." T.R. at 285. By December 18, 2001, four years after the attack, her memory had improved to the point where she now knew that Sirena was really the assailant. T.R. at 388.

Ms. Hondoy noted in her habeas affidavit that the photograph of Julio Osorto Herrera "resembles the person who struck Merry." T.R. at 392. However, she told the police the day after the attack that she knew Mr. Bustillo and that she saw him strike Mr. Merry with the bat. Tr. 03/18/98 at 188-90; T.R. at 180. Following the attack, she obtained money from the petitioner's father. Tr. 03/18/98 at

149-50. By the time of trial, she was sure Mr. Bustillo was not the assailant. Tr. 03/18/98 at 142-43. At that point, she had "no idea who the person is" that attacked Mr. Merry. Tr. 03/18/98 at 142-43. She also could not recall whether she told the police she knew Mr. Bustillo. Tr. 03/18/98 at 157.

Ms. Queirolo told Detective Cline that she saw Mr. Bustillo swing the bat, but did not see the actual impact. T.R. 179. She said she had known Mr. Bustillo for a year, and had seen him at "parties and stuff." Trial exhibits, Def. Ex. I; Tr. 06/17/98 at 12; T.R. at 467. Ms. Queirolo said she knew Sirena because one of her friends used to date him. T.R. at 467. Several weeks before trial, she became unsure, but she said the assailant "could be" Mr. Bustillo. Tr. 06/17/98 at 13-14. Three and a half years later, she had become convinced the attacker was Sirena. T.R. at 467.

Given these circumstances, there is no reasonable probability that any reasonable fact finder would credit such inconsistent testimony. Indeed, it would likely strengthen the fact finder's conclusion that Mr. Bustillo was guilty. At the hearing on the motion to reconsider the verdict, the trial court made this observation, noting that adducing testimony from such witnesses "if anything, it may have produced a more harsh result. . . . " Tr. 07/13/98 at 260-61. Moreover, these witnesses were all known to trial counsel, who made a tactical decision not to call them. H.R. 242-46; Tr. 06/17/98 at 14; Tr. 07/13/98 at 92-93, 102. Since the witnesses were purposefully not called at trial, Mr. Bustillo's claim of prejudice evaporates. In addition, Mr. Bustillo obtained a photograph of Sirena nearly three months before the trial court entered its final order. Tr. 07/13/98 at 143-45; T.R. at 244. If he wanted to test the recollection of the witnesses with that photograph, he certainly had the opportunity to do so before final

judgment. He did so with Ms. Queirolo in a post-trial hearing. Tr. 06/17/98 at 8-10. Mr. Bustillo chose to forego the opportunity with other witnesses. Finally, since the vast majority of these witnesses knew Sirena, some of them over a period of years, or shared membership in the Commerce Street Locos gang, or even dated him, it is difficult to comprehend why a photograph was so necessary for identification.

2. Confirmation of Sirena's Flight Would Not Have Altered the Outcome.

Confirmation of Sirena's flight to Honduras would not have altered the outcome. If, as Mr. Bustillo asserts, Sirena was not only present at the crime scene but also running behind Mr. Bustillo, bat in hand, toward the victim, he was as guilty as the perpetrator in the eyes of the law. *See Taylor v. Virginia*, 537 S.E.2d 592, 594 (Va. 2000); *Moehring v. Virginia*, 290 S.E.2d 891, 892 (Va. 1982). The police had stopped and questioned Julio Osorto on the night of the attack. Therefore, assuming Mr. Osorto and Sirena are the same, he had a compelling motive to flee, regardless of the petitioner's guilt.

Moreover, at trial, Ms. Martinez testified without contradiction that Sirena had left the United States shortly after the attack. Tr. 03/18/98 at 167-69. Further minimizing any prejudice along these lines, Detective Cline confirmed that Sirena could not be found in the weeks following the attack. Tr. 03/18/98 at 70-71. Mr. Amaya also said he had not seen Sirena since the assault. Tr. 03/18/98 at 101-02. Additionally, Mr. Bustillo's counsel was aware of other witnesses who could have placed Sirena at the crime scene and corroborated his existence,

including Mr. Canas, who told the police he saw Sirena "cock" the bat. However, Mr. Bustillo's counsel made a strategic decision not to call those witnesses owing, in part, to their "dubious credibility." *Pet. App.* at 14, n.43. Finally, this tangential information, a photograph and confirmation of the flight, do not alter the fundamental evidence against the petitioner: three eyewitnesses, two of whom knew Mr. Bustillo, who had seen him enter the restaurant moments before the attack, identified him in good light as the assailant. In contrast, Mr. Bustillo's inconsistent and biased witnesses have failed to convince each time they have been called to testify.

3. Sirena's "Confession" Would Not Have Altered the Outcome.

Sirena's "confession" would not have altered the outcome. Even if the "confession" could have been procured in time for use at trial, a most doubtful proposition, it would not have been admissible under state or federal law. Although both this Court and the Supreme Court of Virginia have allowed the admissibility of third party-confessions, *see Chambers v. Mississippi*, 410 U.S. 284, 287-89 (1973), *Hines v. Virginia*, 117 S.E. 843, 845 (Va. 1923), such evidence was held to be admissible only in circumstances that strongly suggested the reliability of the third-party confession: the confession was made repeatedly to neutral witnesses who were available to testify. In this instance, "Sirena," a member of the Commerce Street Locos gang who is beyond the reach of cross-examination, supposedly provided a videotaped statement at the prodding of another gang member, for the benefit of an incarcerated member of his gang. No Virginia court would admit a third-party confession under such circumstances.

In sum, even if Mr. Bustillo had been aware of his right to contact consular officials and had done so, the outcome would not have been different. The failure to follow the Vienna Convention was harmless error. If this Court is going to decide whether the Vienna Convention creates judicially enforceable individual rights, it should do so in a case where the answer to that question actually matters.[16] It should not do so in a case, such as this one, where the failure to follow the Vienna Convention violation is harmless error. Certiorari should be denied.

II. THIS COURT SHOULD DENY REVIEW OF THE *BRADY* CLAIMS.

Regardless of whether this Court grants certiorari on the Vienna Convention issue, it should deny certiorari on the *Brady* claims. This is so for two reasons. First, there is an adequate and independent state ground for dismissal of the *Brady* claims. Second, regardless of whether there is an adequate and independent state ground, Mr. Bustillo's *Brady* claims are routine and unworthy of this Court's review.

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[16] Moreover, this Court should wait for further developments in the lower courts and foreign courts. Since the dismissal of the Writ in *Medellin*, there is no published authority from any court – state or federal – addressing whether the Vienna Convention creates judicially enforceable individual rights. Nor does Mr. Bustillo offer any authority from signatory states to the Vienna Convention adopting or rejecting *Avena's* reasoning.

A. There Is an Adequate and Independent State Ground for Dismissal of the *Brady* Claims.

In *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court summarized its longstanding jurisprudence and emphasized that:

> This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. . . . This rule applies whether the state law ground is substantive or procedural. . . . In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.

Id. at 729 (citations omitted). In other words, this Court will not review a decision of a state court which is based on state law – whether it is substantive or procedural.

In the present Petition, the lower court dismissed Mr. Bustillo's *Brady* claims because he had not timely filed the transcripts of the evidentiary hearing, a violation of Virginia Supreme Court Rule 5:11(a). *Pet. App.* at 1. The procedural bar in question was firmly established and is regularly followed. *See Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) (State procedural default is an "independent and adequate state procedural bar" barring subsequent federal review when the state rule was "'firmly established and regularly followed'" at the time it was applied.).

First, the rule is hardly a new one. *See Towler v. Virginia*, 221 S.E.2d 119, 121 (Va. 1976) (Transcripts that are indispensable to adjudication which are not properly made part of the record will result in appeal being dismissed.). Furthermore, the rule has been regularly and consistently applied. *Palmer v. Virginia*, 609 S.E.2d 308, 309 n.2 (Va. 2005) (noting first appeal was dismissed in Court of Appeals of Virginia for failure to timely file a transcript); *Henry*, 576 S.E.2d at 495 n.2 (same); *Turner v. Virginia*, 341 S.E.2d 400, 402 (Va. App. 1986); *Barrett v. Barrett*, 339 S.E.2d 208, 209-10 (Va. App. 1986). Indeed, the Supreme Court of Virginia recently dismissed a habeas corpus appeal brought by a local government because it had not timely filed the transcripts. *Virginia v. Raja*, Record No. 042846 (Va. July 6, 2005) (available at http://www.courts.state.va.us/).

Mr. Bustillo contends that the state court erroneously applied its own law because the memorandum opinion of the trial court enabled the appellate court to reach the issue. The only decision Mr. Bustillo can offer from the Supreme Court of Virginia is *Roe v. Roe*, 324 S.E.2d 691, 692 n.1 (Va. 1985), where the Court concluded that the opinion of the trial court sufficed to allow the appellate court to reach the issues. What he neglects to mention, however, is the Court's observation in *Roe* that the facts in that case were "entirely undisputed." *Id.* In the case at bar, in contrast, the evidence was sharply contested. *Roe*, therefore, lends the petitioner no support.

The fact that on rare occasions the transcript is not necessary to reach the issues does not alter the fact that the rule is consistently applied. For example, in *Wolfe v. Virginia*, 371 S.E.2d 314, 316 (Va. App. 1988), the court concluded that the record, without the transcript, was

sufficient. In so doing, however, the court stated: "[w]e emphasize that our decision to review this case without a trial transcript or statement of facts is the rare exception rather than the general rule. The trial transcript usually is indispensable." *Id.* Moreover, the consistent or regular application of a State's procedural default rules does not mean undeviating adherence to such rule admitting of no exception. *See Dugger v. Adams*, 489 U.S. 401, 410-12 n.6 (1989) (Despite possible exceptions, the procedural bar at issue was applied by Florida's highest court "[i]n the vast majority of cases.").

The transcript in this case was indispensable. Presumably because the petitioner's own evidence failed to establish any materiality, the circuit court's memorandum opinion did not discuss the respondent's evidence. At the hearing, the respondent adduced evidence from the medical examiner that performed the autopsy on the victim, from three firefighters who were at the crime scene and from one police officer, all of whom testified to the lack of blood spatter. Finally, one of the officers who detained Sirena on the night of the attack testified about his observations of the red "stains" on Sirena. Due to the absence of transcripts, the Supreme Court of Virginia determined it could not review this evidence and properly dismissed the assignments of error that required those transcripts.

B. There Is No Need to Review the State Court's Resolution of Common *Brady* Claims.

Regardless of whether Mr. Bustillo can somehow evade the adequate and independent state default, he fails to present any issue beyond a routine dispute concerning the materiality of certain undisclosed notes from the

police. A writ of certiorari will be granted only for "compelling reasons." Sup. Ct. R. 10. Furthermore, this Court does not provide case-specific error correction. *Overton v. Ohio*, 534 U.S. 982, 985 (2001) (Breyer, J.) (statement respecting denial of certiorari); *Calderon v. Thompson*, 523 U.S. 538, 569 (1998) (Souter, joined by Stevens, Ginsburg & Breyer, J.J., dissenting) (noting it is "axiomatic that this Court cannot devote itself to error correction. . . . ").

Nor was there any error in the approach employed by the trial court. The evidence was uncontested that the victim was struck once in the head by a bat-wielding assailant, who immediately fled. Tr. 03/17/98 at 222, 264; Tr. 03/18/98 at 27, 111. The medical examiner testified there was no breaking of the skin where the injury took place. Tr. 03/17/98 at 193. Mr. Bustillo attempted to prove that the stains on Sirena, which are described by an experienced police officer as appearing to be ketchup, not blood, were in reality the victim's blood. However, he failed to prove that the victim's blood, most improbably, immediately shot out of the victim's ear on impact and, by amazing coincidence, landed on the rapidly fleeing assailant, all without contaminating the baseball bat employed in the attack. His own expert, as the memorandum of the trial court reflects, testified at one point that the blow to the victim's head would have caused blood to "seep" out of the victim's ear. This account, the trial court found, was consistent with the crime scene photographs that display only a few sizable droplets of blood, but no signs of spatter or spray. The trial court also did not find credible the inconsistent

accounts from the two witnesses who claimed to have seen the victim's blood spray on others.[16]

CONCLUSION

The petition for a writ of certiorari should be **DENIED**.

Respectfully submitted,

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[16] Mr. Bustillo argues that the eyewitnesses who identified him were mistaken because they made their identification based on the assailant's clothes. He claims that Sirena was wearing a red shirt, and Mr. Bustillo had been seen earlier wearing a red shirt. *Pet. App.* at 8. However, the report from Officer Mahoney, the document Mr. Bustillo claims to be exculpatory, shows that Sirena was wearing a black leather jacket. If the "red stains" were visible on his shirt, it is most unlikely he wore anything red under his leather jacket. Therefore, this police report would have actually undermined the defense theory of mistaken identification.

(4)

No. 05-51

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IN THE

Supreme Court of the United States

MARIO A. BUSTILLO,

Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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TABLE OF CONTENTS

		Page
I.	This Case Squarely Presents The Vienna Convention Issues	2
	A. Whether State Procedural Bars May Preclude Vienna Convention Claims Is The Very Question Presented By The Petition	2
	B. Respondent's Effort To Invoke *Teague* v. *Lane* Is Misplaced And Waived In Any Event	3
	C. The Violation Of Petitioner's Vienna Convention Rights Was Not "Harmless Error"	7
II.	Petitioner's *Brady* Claim Is Not Procedurally Barred	9

TABLE OF AUTHORITIES

Page

CASES

Adams v. *Apker*, No. 05-2350, 2005 WL 2082919 (3d Cir. Aug. 30, 2005) 1

Arizona v. *Evans*, 514 U.S. 1 (1995) 5

Bieregu v. *United States*, No. Civ. A. 05-2692(DRD), 2005 WL 2237686 (D.N.J. Sept. 14, 2005) 1

Beard v. *Banks*, 124 S. Ct. 2504 (2004) 4

Breard v. *Greene*, 523 U.S. 371 (1998) 7

Case Concerning Avena and Other Mexican Nationals (Mex. v. *U.S.)*, 2004 I.C.J. 128 (Mar. 31) 2

Caspari v. *Bohlen*, 510 U.S. 383 (1994) 4

Chambers v. *Mississippi*, 410 U.S. 284 (1973) 9

Collins v. *Youngblood*, 497 U.S. 37 (1990) 6

Ex parte Grossman, 267 U.S. 87 (1925) 6

Ford v. *Georgia*, 498 U.S. 411 (1991) 9

Gomez v. *Dretke*, No. 04-70047, 2005 WL 1983693 (5th Cir. Aug. 17, 2005) 1

Great N. Ry. Co. v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932) 5

Hines v. *Virginia*, 117 S.E. 843 (Va. 1923) 9

Hopkins v. *Reeves*, 524 U.S. 88 (1998) 6

Kentucky v. *Stincer*, 482 U.S. 730 (1987) 6

LaGrand Case (F.R.G. v. *U.S.)*, 2001 I.C.J. No. 104 (June 27) 2

Long v. *Dist. Court of Iowa*, 385 U.S. 192 (1966) 5

TABLE OF AUTHORITIES—Continued

	Page
Meadows v. *State*, 849 S.W.2d 748 (Tenn. 1993)	4
Medellín v. *Dretke*, 125 S. Ct. 2088 (2005)	1, 2, 3
Minnesota v. *Nat'l Tea Co.*, 309 U.S. 551 (1940)	5
Mueller v. *Murray*, 478 S.E.2d 542 (Va. 1996)	6
Ortiz v. *United States*, No. 8:02-CV-905-T-30TBM, 2005 WL 2129191 (M.D. Fla. Sept. 2, 2005)	1
Pennsylvania v. *Finley*, 481 U.S. 551 (1987)	5
People v. *Moreno*, No. B177572, 2005 WL 2374746 (Cal. Ct. App. Sept. 28, 2005)	1
People v. *Tapia-Fierro*, No. F046280, 2005 WL 2249007 (Cal. Ct. App. Sept. 15, 2005)	1
Ramirez v. *State*, No. S05A0664, 2005 WL 2264638 (Ga. Sept. 19, 2005)	1
Roberts v. *Galen of Va., Inc.*, 525 U.S. 249 (1999)	6
Roper v. *Simmons*, 125 S. Ct. 1183 (2005)	4, 5
Rosales v. *Bureau of Immigration & Customs Enforcement*, No. 04-10630, 2005 WL 2292526 (5th Cir. Sept. 21, 2005)	1
Rosero v. *United States*, No. 803CR82T17EAJ, 2005 WL 2372012 (M.D. Fla. Sept. 27, 2005)	1
Sawyer v. *Smith*, 497 U.S. 227 (1990)	3
Smith v. *Bennett*, 365 U.S. 708 (1961)	5

TABLE OF AUTHORITIES—Continued

Page

State v. *Whitfield*, 107 S.W.3d 253 (Mo. 2003) 4

Stringer v. *Black*, 503 U.S. 222 (1992) 4

Teague v. *Lane*, 489 U.S. 288 (1989) ..... *passim*

Torres v. *State*, No. PCD-2004-442, 2005 WL 2130195 (Okla. Crim. App. Sept. 6, 2005) 1, 7

United States v. *Cobain*, No. 04-30412, 2005 WL1901583 (9th Cir. Aug. 10, 2005) 1

United States v. *Hall*, No. CR-03-910 CPS, 2005 WL 1984463 (E.D.N.Y. Aug. 17, 2005) 1

Victor v. *Nebraska*, 511 U.S. 1 (1994) 4, 5

Wolfe v. *Virginia*, 371 S.E.2d 314 (Va. App. 1988) 9, 10

Wright v. *Rasbeary*, No. 04-11204, 2005 WL 1950779 (5th Cir. Aug. 16, 2005) 1

TREATIES AND RULES

Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 488:

Art. 36 ..... 1, 2

Art. 36(2) 2, 6

Va. S. Ct. R. 5:11(b) 9

Va. S. Ct. R. 5:18(b) 7

Va. S. Ct. R. 5:25 7

MISCELLANEOUS

Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 6

REPLY FOR PETITIONER

Respondent concedes the importance of the issues presented. Br. in Opp. 12. Respondent also admits that the International Court of Justice (ICJ) twice has "held that the Vienna Convention on Consular Relations * * * creates judicially enforceable individual rights and that American courts" may not invoke "procedural rules" to avoid "enforcing those rights." Br. in Opp. 1. Respondent does not deny that the courts of this Nation have reached conflicting results. Pet. 15-20. Nor does respondent dispute the need for this Court to issue a definitive interpretation of Article 36 of the Vienna Convention. *Ibid.* This Court, in fact, granted review to consider these issues in a related context last Term, but was unable to reach them. *Medellín* v. *Dretke*, 125 S. Ct. 2088 (2005). Pet. 20-22; Br. in Opp. 1, 12. Since then, the importance of this issue has become even more apparent.[1]

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[1] As set forth in the petition (at 16-18), at least 34 different state and federal courts have been confronted with Vienna Convention claims, many repeatedly, without any movement toward a consensus on the proper construction of Article 36. It is thus unclear what benefit this Court could derive by "wait[ing] for further developments in the lower courts and foreign courts." Br. in Opp. 23 n.16. In fact, at least 13 additional federal and state cases involving Vienna Convention claims have been decided since this petition was filed on July 5, 2005. *Rosales* v. *Bureau of Immigration & Customs Enforcement*, No. 04-10630, 2005 WL 2292526 (5th Cir. Sept. 21, 2005); *Adams* v. *Apker*, No. 05-2350, 2005 WL 2082919 (3d Cir. Aug. 30 2005); *Gomez* v. *Dretke*, No. 04-70047, 2005 WL 1983693 (5th Cir. Aug. 17, 2005); *Wright* v. *Rasbeary*, No. 04-11204, 2005 WL 1950779 (5th Cir. Aug. 16, 2005); *United States* v. *Cobain*, No. 04-30412, 2005 WL1901583 (9th Cir. Aug. 10, 2005); *Rosero* v. *United States*, No. 803CR82T17EAJ, 2005 WL 2372012 (M.D. Fla. Sept. 27, 2005); *Bieregu* v. *United States*, No. Civ. A. 05-2692(DRD), 2005 WL 2237686 (D.N.J. Sept. 14, 2005); *Ortiz* v. *United States*, No. 8:02-CV-905-T-30TBM, 2005 WL 2129191 (M.D. Fla. Sept. 2, 2005); *United States* v. *Hall*, No. CR-03-910 CPS, 2005 WL 1984463 (E.D.N.Y. Aug. 17, 2005); *People* v. *Moreno*, No. B177572, 2005 WL 2374746 (Cal. Ct. App. Sept. 28, 2005); *Ramirez* v. *State*, No. S05A0664, 2005 WL 2264638 (Ga. Sept. 19, 2005); *People* v. *Tapia-Fierro*, No. F046280, 2005 WL 2249007 (Cal. Ct. App. Sept. 15, 2005); *Torres* v. *State*, No. PCD-2004-442, 2005 WL 2130195 (Okla. Crim. App. Sept. 6, 2005).

Respondent nonetheless suggests there are barriers to review in this case. That claim is wholly unpersuasive. In fact, close review of respondent's arguments demonstrates that this case is an ideal vehicle for further review.

I. This Case Squarely Presents The Vienna Convention Issues

While conceding the importance of the Vienna Convention issues, Br. in Opp. 12, respondent asserts that this case presents a "poor vehicle" for resolving them because of (a) a state procedural bar and (b) the effects of *Teague* v. *Lane*, 489 U.S. 288 (1989), an issue respondent never raised below. Neither claim has merit, and the latter is clearly waived.

A. Whether State Procedural Bars May Preclude Vienna Convention Claims Is The Very Question Presented By The Petition

Respondent urges this Court to deny the petition because the Virginia courts denied the Vienna Convention claims solely on the basis of state law. Br. in Opp. 14-16. In particular, respondent points to the state-law procedural bar resulting from petitioner's putative failure to raise the Vienna Convention when he first appealed his conviction. See *ibid.* But the validity of such procedural bars against Vienna Convention claims *is one of the very questions presented for this Court's review*—and one of the issues this Court previously sought to resolve in *Medellín*. See Pet. i; *Medellín*, 125 S. Ct. at 2089.

As respondent concedes, Br. in Opp. 1, the ICJ has held that States may *not* invoke such procedural bars because they violate Article 36 of the Vienna Convention, preventing "'full effect [from being] given to the purposes for which the rights accorded under this article are intended.'" *LaGrand Case (F.R.G.* v. *U.S.)*, 2001 I.C.J. 466, ¶ 91 (June 27) (quoting Vienna Convention, art. 36(2), 21 U.S.T. at 101); *Case Concerning Avena and Other Mexican Nationals (Mex.* v. *U.S.)*, 2004 I.C.J. 128, ¶ 113 (Mar. 31) (similar); see Pet. 15-16. The question presented below to the Virginia courts, and now to this Court, is whether Article 36 of the Vienna Convention—a federal treaty that supersedes inconsistent state laws under

the Supremacy Clause—requires Virginia to provide a forum for Vienna Convention claims *despite* the Commonwealth's procedural default rules. As in *Medellín*, "the relevant federal question [is] whether, under Article 36(2), the treaty overrides state procedural default rules." 125 S. Ct. at 2099 (O'Connor, J., dissenting). In the decision below, the Virginia Supreme Court answered that question in the negative, finding "no reversible error" in the circuit court's invocation of Virginia's procedural default rules (despite petitioner's invocation of the Vienna Convention and the ICJ's decisions interpreting it). Pet. App. 1a; Pet. for Review 14-15, 32-33 (Va. S. Ct., filed Sept. 3, 2004). The question presented here is whether that ruling—an issue of federal law involving the construction of an international treaty—was correct.

B. Respondent's Effort To Invoke *Teague* v. *Lane* Is Misplaced And Waived In Any Event

Respondent also urges (Br. in Opp. 12-14) that *Teague* v. *Lane* precludes this Court from addressing the Vienna Convention issues because their resolution might require the Court to announce a "new rule" of criminal procedure. As explained *infra* (at 6-7), respondent never asserted *Teague* arguments (or any retroactivity claim) below, despite ample opportunity to do so. As a result, that claim is waived. Moreover, *Teague* is wholly inapposite. That case articulates a rule applicable to courts on *federal* habeas review. It does not purport to address the applicability of federal law in *state* habeas proceedings or in this Court on direct review of those state proceedings.

1. Setting aside (for the moment) respondent's clear waiver of the *Teague* objection, *Teague* has no application here. In *Teague*, this Court declined to consider a novel Sixth Amendment claim raised for the first time in *federal* habeas corpus proceedings. The Court held that *federal* "habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure," subject to two exceptions. 489 U.S. at 317. The Court implemented the *Teague* rule to recognize the more deferential "purpose of *federal* habeas corpus," *Sawyer* v. *Smith*, 497 U.S. 227, 234 (1990) (emphasis

added), and repeatedly has characterized *Teague* as a decision regarding the scope of *federal* habeas review of state convictions. See, *e.g.*, *Beard* v. *Banks*, 124 S. Ct. 2504, 2511 (2004); *Caspari* v. *Bohlen*, 510 U.S. 383, 389 (1994); *Stringer* v. *Black*, 503 U.S. 222, 227-228 (1992). As respondent admits, *Teague* established that "a state conviction cannot be disturbed on *federal* collateral review based on a 'new rule' of federal law." Br. in Opp. 12-13 (emphasis added).

This case, however, does not arise on federal habeas review. It arises on this Court's *direct review* of a *state* habeas decision. Respondent does not explain why *Teague* would apply in that context. And this Court has *never* applied *Teague* on direct review of *state* habeas proceedings. To the contrary, this Court has repeatedly considered "new rules" on review of state habeas decisions without even mentioning *Teague*. See, *e.g.*, *Roper* v. *Simmons*, 125 S. Ct. 1183 (2005); *Victor* v. *Nebraska*, 511 U.S. 1 (1994). *Roper*, for example, announced that the Constitution forbids imposition of the death penalty on an offender who was under the age of 18 at the time of the offense—a rule so "new" that it required the Court to overrule a prior decision. See *Roper*, 125 S. Ct. at 1192. Even though *Roper* arose on direct review of a state habeas decision, this Court's decision never so much as mentioned *Teague*, and with good reason: *Teague* is a rule about *federal* habeas—not state habeas.

Respondent's effort to impose *Teague* on state habeas is fundamentally at odds with the principles of federalism undergirding that decision. Subject to the Supremacy Clause (and the constitutional and treaty obligations that follow), the scope of state habeas is primarily an issue of state law. This Court decided *Teague* as a matter of federal common law (or perhaps as a construction of the federal habeas statute), not constitutional law. As a result, there is no basis for requiring its application to state habeas proceedings. See *State* v. *Whitfield*, 107 S.W.3d 253, 267 (Mo. 2003) (holding that *Teague* does not apply on state habeas); *Meadows* v. *State*, 849 S.W.2d 748, 755 (Tenn. 1993) (same). It would be ironic if *Teague*, which was founded on principles of federalism, were applied to

preclude the States from *choosing* to give retroactive effect to this Court's decisions in state habeas proceedings. Cf. *Great N. Ry. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932) ("A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.").

Nor is there any basis for applying *Teague* to this Court's *direct* review of state court habeas decisions that, without addressing retroactivity, resolve important issues of federal law. See, *e.g.*, *Roper*, 125 S. Ct. at 1189; *Victor*, 511 U.S. at 18-19. Where state courts choose to address issues of federal law, their decisions are subject to review by this Court. There is no principled basis for declaring that state courts may address important issues of federal law but then preclude this Court's direct review of the resulting decisions.

Respondent's novel expansion of *Teague* would also lead to anomalous results. It would effectively foreclose this Court's review of a host of claims that can be raised only on collateral review, such as ineffective assistance of counsel, as well as challenges to the constitutionality of state habeas procedures. Once a state establishes its own habeas procedures, they are subject to constitutional scrutiny in this Court. See *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987); *Long* v. *Dist. Court of Iowa*, 385 U.S. 192 (1966); *Smith* v. *Bennett*, 365 U.S. 708 (1961). The validity of a state habeas procedure (here, the invocation of a procedural bar to preclude review of a federal treaty violation) cannot be raised on direct review, because the issue would not be ripe. Accordingly, this Court *must* be able to review such a claim on direct review of state habeas decisions. *Arizona* v. *Evans*, 514 U.S. 1, 9 (1995) ("'important federal issues * * * will reach this Court for adjudication'"; "'state courts will not be the final arbiters of important issues under the federal constitution'") (quoting *Minnesota* v. *Nat'l Tea Co.*, 309 U.S. 551, 557 (1940)).[2]

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[2] Respondent posits that prisoners may petition this Court for an extraordinary writ, Br. in Opp. 16 n.13, but this Court's power to issue an "original" writ is greatly circumscribed; no petitioner has obtained

The effort to apply *Teague* to preclude consideration of petitioner's Vienna Convention claims, moreover, suffers from the same defect as the Commonwealth's invocation of its own procedural bar. If the Vienna Convention precludes States from invoking procedural bars where doing so prevents "'full effect [from being] given to the purposes for which the rights accorded [by Article 36 of the Vienna Convention] are intended'"—as the ICJ has held—then the same is true of efforts to invoke *Teague* to prevent consideration of otherwise meritorious Vienna Convention claims. Respondent's *Teague* argument thus begs precisely the same question as the procedural bar argument—whether procedural rules that allow courts to refuse to hear Vienna Convention claims are consistent with Article 36(2). Thus, far from precluding the Court from reaching the questions presented, petitioner's novel *Teague* argument underscores their importance.

2. Merits aside, this Court need not address the *Teague* argument because respondent waived it. *Teague* is not jurisdictional; it may be waived by failing to raise it below. *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990); *Hopkins* v. *Reeves*, 524 U.S. 88, 94 n.3 (1998) ("Because the State raised this [*Teague*] argument for the first time in its petition for a writ of certiorari, we choose to decide the case on its merits.").

Here, respondent had every opportunity to raise *Teague* (or retroactivity issues) below, since Virginia has adopted the *Teague* analysis for state habeas proceedings. See *Mueller* v. *Murray*, 478 S.E.2d 542, 544 (Va. 1996). But respondent never asserted that *Teague* prevented adjudication of the Vienna Convention claims. Nor did it make that argument under the more general rubric of non-retroactivity. Having failed to raise the issue in state court, respondent may not raise those arguments for the first time here. *Hopkins*, 524 U.S. at 94 n.3; *Roberts* v. *Galen of Va., Inc.*, 525 U.S. 249, 253-254 (1999); *Kentucky* v. *Stincer*, 482 U.S. 730, 747 n.22 (1987).

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such relief in 80 years. See *Ex parte Grossman*, 267 U.S. 87 (1925); see also Robert L. Stern *et al.*, *Supreme Court Practice* 591 (8th ed. 2002).

In fact, Virginia's procedural default rules would have blocked respondent from belatedly raising the *Teague* argument in the Supreme Court of Virginia. Respondent never raised *Teague* in the circuit court, see Va. S. Ct. R. 5:25 (requiring objections to be raised in trial court), and never raised it in opposition to the petition for appeal in the Virginia Supreme Court, Va. S. Ct. R. 5:18(b) ("[N]o cross-error not then assigned [in opposition to a petition for appeal] will be noticed by this Court."). Accordingly, and ironically, respondent's attempt to raise *Teague* here is barred by an independent state ground.

C. The Violation Of Petitioner's Vienna Convention Rights Was Not "Harmless Error"

Finally, respondent argues that this Court should not resolve the concededly important Vienna Convention issues here because the violation of petitioner's Vienna Convention rights was "harmless." Br. in Opp. 17-23. But that argument was not addressed by the state courts, which refused relief based on procedural default alone. Moreover, the violation was anything but harmless. As explained in the petition (at 22-25), it resulted in the conviction of an innocent Honduran national for a murder committed by another Honduran national—who had fled to Honduras the day after the victim's death and who has been videotaped bragging that he committed the offense.

Respondent's contrary argument consists of examining three pieces of evidence petitioner likely could have obtained before trial absent the Vienna Convention violation and suggesting that, taken individually, those pieces of evidence "would not have altered the outcome." Br. in Opp. 18, 21-23. But petitioner at most is required to make "*some* showing that the [Vienna Convention] violation *had an effect* on the trial." *Breard* v. *Greene*, 523 U.S. 371, 377 (1998) (emphasis added); see *Torres* v. *State*, No. PCD-2004-442, 2005 WL 2130195, at *1 & n.6 (Okla. Crim. App. Sept. 6, 2005) (collecting cases that find prejudice if the Consulate would have provided evidence for use at trial). Here, obtaining the Honduran Government's assistance would have had a substantial impact on the trial and its outcome.